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Convention on jurisdictional immunities of States and their property

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Report of the Secretary-General

Addendum

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II. Replies received from States

Italy

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General remarks

1. The Government of Italy has attached special importance to the work of the International Law Commission (ILC) on the present topic since its inception. As recalled by the ILC in its *travaux préparatoires*, the Italian judiciary has been in the forefront since the beginning of the last century in the development of the so-called restrictive immunity doctrine, now generally followed by State practice.

2. We have on previous occasions had the opportunity to commend the ILC for the draft on the present topic it submitted to the General Assembly in 1991. It should also be stressed that the ILC draft was the result of a study which had been carried out during a period in which the institutional and economic settings on the international landscape were far different from now. This explains why the provisions contained in that draft have required further work since 1991. This additional work has been useful, particularly in identifying the main issues on which general agreement is still to be found. The ILC should be praised for the contribution it provided to that effect in chapter VII of the report on the work of its fifty-first session[1] and in the report of its Working Group on the topic annexed thereto. It has given guidance to the discussions that took place in the Working Group of the Sixth Committee on this topic during the fifty-fourth and fifty-fifth sessions of the General Assembly.

3. Two major indications have emerged from the above discussions. First, the substantive outstanding issues touch upon the very core of the present topic, namely: (a) definition of the State for purposes of immunity; (b) definition of the commercial character of a contract or transaction; (c) concept of a State enterprise or other entity in relation to commercial transactions; (d) contracts of employment; (e) measures of constraint against State property. Secondly, the positions among delegations on many key provisions bearing on the above issues remain divergent, while the relevant case law in many countries is still evolving. We therefore think that more substantive work is still to be done in order to adjust the existing text to the recent developments of State practice and legislation. Accordingly, Italy looks forward to the first meeting of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property established pursuant to paragraph 3 of General Assembly resolution 55/150, of 12 December 2000.

4. As to the form of the end product of the work on this topic, the elaboration of a convention would be the ideal outcome. However, if disagreement on the outstanding issues were to persist and prevent the drafting of more precise and detailed provisions, aiming at a convention might prove a counterproductive exercise. At the current stage, where State practice in many countries is still evolving, a model law, or a set of guidelines, might still serve the purpose of providing general terms of reference to national legislatures and judicial organs.

Definition of the State for the purposes of immunity

5. With reference to the report of the Chairman of the open-ended Working Group of the Sixth Committee established under General Assembly resolution 54/101 of 9 December 1999 (A/C.6/55/L.12, hereinafter "Report"), Italy favours the drafting changes introduced in article 2, paragraph 1 (b), of the 1991 ILC draft, merging former subparagraphs (ii) and (iii). We consider the new language most appropriate insofar as it makes clear that the various organs of the State, its political subdivisions, its agencies or instrumentalities, as well as the constituent units of a federal State, fall within the definition of the State for purposes of immunity if it is established that, not only they are entitled to perform acts in the exercise of sovereign authority, but also that they are acting in that capacity.

Definition of the commercial character of a contract or transaction

6. A general international rule has been formulated through a century-long State practice to the effect that a State cannot invoke immunity from jurisdiction if it engages in a commercial transaction with a foreign natural or juridical person. We find it of paramount importance that this rule, which is codified in article 10 of the 1991 ILC draft, will not be nullified by an ambivalent definition of "commercial transaction" in article 2, paragraph 1 (c).

7. Italy considers the "nature test" to be in principle the sole criterion for determining the commercial character of a contract or transaction. In a spirit of compromise we can support at the current stage alternative I proposed by the Chairman of the Working Group (see Report, para. 25) consisting of the deletion of paragraph 2 of article 2.

Concept of a State enterprise or other entity in relation to commercial transactions

8. As stated on previous occasions, Italy considers article 10, paragraph 3, of the 1991 ILC draft superfluous, if not confusing. Accordingly, we share the view of those delegations that favour its deletion. However, consideration could also be given to alternative II on item 3 as proposed by the Chairman of the Working Group (see Report, para. 37) provided that the issue of the under-capitalization of a State enterprise is addressed in the new text.

Contracts of employment

9. Italy favours the revised text of article 11, paragraph 2, as proposed by the Chairman of the Working Group (Report, para. 49), since it accommodates the concerns expressed by our delegation on previous occasions. As to the suggestion to add in that provision a list of persons enjoying diplomatic immunity, it might prove to be useful ex abundante cautela.

Measures of constraint against State property

10. Italy has been among those delegations that have advocated the introduction in the draft of a distinction between pre- and post-judgement measures of constraint. The rationale of this distinction lies in the fact that immunity from pre-judgement measures is broader than that from measures taken with a view to executing a judgement.

11. In the light of the above, Italy supports the addition of article XY (preceding article 18) on pre-judgement measures of constraint, as well as of new article 18 bis (see Report, para. 88). As to article 18 on post-judgement measures, without prejudice to our position on the wording of the final text, we favour alternative I and the deletion of the words currently within square brackets.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10).

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II. Replies received from States

Japan

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1. Japan highly appreciates the work of the open-ended Working Group on Jurisdictional Immunities of States and Their Property under the strong leadership of its chairman, Gerhard Hafner. Also, the Working Group would not have been able to make as much progress as it has without the valuable contribution of the International Law Commission (ILC).

2. Establishing a convention in the area of jurisdictional immunities of States and their property is significant in the context of advancing the codification of international law, and even more so in providing stability and predictability in transactions between States and private parties. Much progress has been achieved towards this goal since the draft was submitted to the Sixth Committee in 1991, and the remaining points of contention are indeed very few. Japan is of the view that by having intensive discussions during the session of the Ad Hoc Committee to be held in February 2002, further progress can be achieved on these points. Japan hopes that all the efforts put into this topic will finally bear fruit in the form of a convention.

3. In the following paragraphs, Japan limits its specific comments to three of the five outstanding substantive issues: item 2 (definition of commercial character of a contract or transaction), item 3 (concept of a State enterprise or other entity in relation to commercial transactions) and item 5 (measures of constraint against State property) as the differences in the other two items are now very narrow. It may make further comments on the draft on other occasions.

Definition of commercial character of a contract or transaction

4. Much progress has been made on this item, although there still remain some differences regarding what is to be taken into consideration in determining whether a certain contract or transaction is a "commercial transaction". The Working Group succeeded in narrowing down the differences to two main alternatives: one is to leave it entirely up to the discretion of national courts to decide what to be taken into consideration in making such determination, and the other is to indicate the points of reference in making such determination which allows, one way or another, for the introduction of the "purpose" test in addition to the "nature" test.

5. Japan questions the sufficiency of the "nature" test in determining whether a certain contract or transaction is a "commercial transaction". Precedents in national legislations and court decisions also seem to indicate that there is little convergence on national practices on this issue. At this point, it seems most appropriate to leave it up to the discretion of national courts to decide what should be understood as a "commercial transaction".

6. Therefore, Japan is of the view that among the three alternatives indicated by the Chairman in chapter V of his report (A/C.6/55/L.12), alternative I would be most preferable. However, it is prepared to consider other alternatives as well in order to facilitate an early conclusion of the item, as both alternatives II and III still leave some room for the discretion of national courts.

Concept of a State enterprise or other entity in relation to commercial transactions

7. The initial draft submitted by the ILC in 1991 contained a provision on State enterprises reflecting the existence of a special form of "segregated property" of State enterprises at the time the draft was being drawn up. However, such a provision bears the danger of States hiding behind State enterprises so that they might be exempt from responsibility in relation to those enterprises. As the situation in the international community has changed drastically since then, Japan, as it stated during the discussions in the Working Group, continues to doubt the necessity of retaining a provision on this issue in the current version of the draft. Japan's preference would therefore be to delete the paragraph.

8. However, Japan is ready to consider alternative II indicated by the Chairman. Regarding that alternative, Japan appreciates the efforts of the Chairman to eliminate the concern expressed by some Member States, including Japan, that the formulation discussed in the Working Group presented the possibility of an a contrario interpretation being applied to it to the extent that if the State enterprise or other entity did not have independent legal capacity it would automatically

enjoy State immunity in respect of commercial transactions, by adding the words "Without prejudice to the other provisions". Nevertheless, some work would be necessary on this alternative, particularly to clarify exactly to what extent the phrase "Without prejudice to the other provisions" affects the extent to which a State enterprise or other entity established by a State enjoys State immunity.

State immunity from measures of constraint

9. Japan supports the basic idea behind the Chairman's proposal indicated in chapter V of his report to have separate articles (or separate paragraphs in one article if that is preferable) for pre- and post-judgement measures of constraint, and allow greater restriction on the imposition of measures of constraint for the former. Japan holds this view because pre-judgement measures of constraint contain the risk of abuse, as the decision to impose such measures will inevitably be made without any substantial consideration of the matter in question.

10. It is the understanding of Japan that one of the substantial points of contention that still remains on this issue is whether or not to grant a grace period in imposing post-judgement measures of constraint against State property in cases other than those in paragraph 1 (a) and (b) in both alternatives, although there are still some Member States that do not support separating pre- and post-judgement measures of constraint. Japan supports the idea that implementation of a judgement should in principle be conducted voluntarily by the State. Japan therefore is more in favour of alternative II than alternative I. It is also flexible on the length of such grace period. The phrase "unless the applicable rules of international law provide otherwise" in paragraph 2 of alternative II lacks clarity and seems to allow for an unduly wide interpretation. Therefore, Japan suggests that it be rephrased to read "unless the international agreements to which the State is a party provide otherwise".

11. Japan is also prepared to opt for not having any provision on measures of constraint if it turns out that no solution on this issue is envisaged even after further discussion in the Ad Hoc Committee. After all, there does not seem to be an established rule of international law on this issue. However, it would be better to have some kind of provision on this point, preferably along the lines described in paragraph 10 above.